AUG 1 1955
HAROLD B. WILLEY, Clerk

In the

Supreme Court of the United States

.....TERM 1955

No. 284

ALLEN M. PEAIRS,

Appellant,

v.

THE STATE OF TEXAS,

Appellee.

On Appeal from the Court of Criminal Appeals of the State of Texas, Austin, Texas

JURISDICTIONAL STATEMENT

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ALLEN M. PEAIRS,

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THE STATE OF TEXAS,

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On Appeal from the Court of Criminal Appeals of the State of Texas, Austin, Texas

---

JURISDICTIONAL STATEMENT

Appellant appeals from the Final Judgment of the Court of Criminal Appeals entered on May 18th, 1955, ordering that Appellant be extradicted on demand of the State of Arkansas from the asylum State of Texas. This statement is submitted to the Supreme Court of the United States to show that the Court has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The opinions of the Court of Criminal Appeals of the State of Texas are as yet unreported (Copied in Appendix A, Pages 11-28).

JURISDICTION

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by *Title 28 U. S. C. A., Sec. 1257(1) and 1257(2), 62 Stat. 929 C. 646, June 25, 1948.*

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal:

Seaboard Air Line R. R. v. Daniel, S. C. 1948, 333 U. S. 118;

General Oil Co. v. Crain, Tenn., 1908, 209 U. S. 211.

The Federal questions were properly raised in the Appellate Court:

Radio Station W. O. W. v. Johnson, 326 U.S. 120, 128;

Whitney v. California, 274 U. S. 357, 360, 361.

for the reason that the Court passed on the Constitutional questions presented on Motion for Rehearing in the majority opinion (R. 97).

Texas practice on Habeas Corpus proceedings with reference to the admission, rejection of evidence and the necessity for objections is not controlled by the same rules

as in other Criminal Trials and the proper method to secure a review of the Trial Court's Order sustaining the validity of the restraint is by Motion to Discharge Appellant at the close of the evidence. See:

Ex parte Gordon, Syl. 3, 37 S. W. 2d 1023:

> "On appeal in habeas corpus proceeding, reviewing court can disregard or consider evidence, regardless of rulings below."

The judgment of the Court raised a substantial Federal question in that Appellant was not charged in the demanding State by *indictment found or affidavit made before a Magistrate* as required by Article 4, Section 2 of the United States Constitution and Title 18, Sec. 3182 U. S. C. A. This resulted in jurisdiction by direct appeal for the reason that the decision of the State Court drew in question the validity of the above article and the above section which required *indictment found or affidavit made before a magistrate.* The Supreme Court of the United States also has jurisdiction because the decision of the State Court passes upon the validity of the State Statute, *Article 1008(a) V. A. C. C. P., State of Texas,* where it was objected to as being repugnant to the Constitution and Laws of the United States. The State Court decided that the provisions of the Statute were valid and overruled the above objection.

QUESTIONS PRESENTED

1. May a State provide by Legislation for the extradition of a fugitive from Justice on conditions and terms

which are far less exacting and which are contrary to the plain provisions of the Federal Constitution and the Federal Statute, *Title 18, Sec. 3182 U. S. C. A. 62, Stat. 822 C. 645, June 25, 1948.*

2. Is the Federal Constitution and enabling Statutes enacted thereunder paramount in interstate extraditions?

3. May a State adopt uniform legislation with other states providing for extradition on any terms or by any means that the states may deem necessary without securing the consent of Congress as required by Article 1, Sec. 10, Clause 3 of the United States Constitution?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution Article 4, Sec. 2, Clause 2 and Article 1, Sec. 10, Clause 3 and Title 18, Section 3182 U. S. C. A., 62 Stat. 822 C. 645, June 25, 1948; Article 1008(a), Sec. 3, V. A. C. C. P. State of Texas are set forth in Appendix B.

STATEMENT OF THE CASE

Appellant was arrested by virtue of the Governor's warrant of the State of Texas on a demand from the State of Arkansas as a fugitive from Justice. On the 16th day of August, 1954, the Criminal District Court, Dallas County, Texas, after hearing evidence on a Writ of Habeas Corpus questioning the legality of the arrest of Appellant, remanded him to the custody of the Sheriff of Dallas Coun-

ty, Texas. Under Texas practice on Writs of Habeas Corpus, all questions with reference to the admission of evidence and of objections during the hearing are raised by Motion to Discharge the Appellant, Appellant appealed to the Court of Criminal Appeals of the State of Texas and the judgment was affirmed on Feb. 9th, 1955. Appellant's Motion for Rehearing was overruled on April 20th, 1955, Judge Davidson dissenting, and Appellant's Second Motion for Rehearing was overruled May 18th, 1955. The Court after ordering Appellant returned to the State of Arkansas, on Motion of Appellant stayed the Mandate of the Court in order to permit an appeal by Appellant to the Supreme Court of the United States. Notice of Appeal was filed in the Court of Criminal Appeals on June 9th, 1955, and service of said Notice was had on the Attorney General of the State of Texas on the 8th day of June, 1955.

HOW THE FEDERAL QUESTION IS PRESENTED

The Federal question was raised in the Trial Court by a Motion to Discharge Appellant and was sufficient because the paramount authority for interstate rendition is the Federal Constitution and Statutes enacted thereunder. The question was also raised on Motion for Rehearing in the Court of Criminal Appeals and was considered by said Court in its majority opinion and therefore was timely raised.

Facts

Appellant was charged by information in the State of Arkansas with failing to discharge a Material Man's Lien.

The information was not supported by affidavit made before a magistrate, as required by Federal law.

THE QUESTIONS ARE SUBSTANTIAL

I. Appellant adopts the dissenting opinion on Motion for Rehearing by Judge Davidson as asserting his contentions as to the merits of this appeal, both as to the presence of a Federal question and that Appellant is entitled to the relief requested. See Appendix A.

The Federal Constitution and Statutes controls interstate extradition and is paramount where there is a conflict with the statutes of the various states.

Lipshitz v. Bersenger, 1947, 75 N. Y., S. 2d 392;

~~*Ex Parte Ricardi, 303 Pac. 2d 627;*~~

State v. Parrish, 1941, Ala. 5 So. 2d 828;

Ex Parte Roberts (36), 56 Pac. 2d 703 Wash.;

Foley v. State, N. J., 1954, 108 A. 2d 24;

Henry v. McArthur, 1950, 223 Pac. 2d 621, Colo.;

McCline v. Meyering, 7 Cir., 75 F. 2d 716;

Day v. Keim, 4 Cir. 2 F. 2d 966;

Ex Parte Morgan, D. C. 20 F. 298;

Ex Parte Montgomery, D. C. 244 F. 967, affirmed 246 U. S. 656;

Kuney v. State, 88 Fla. 354, 102 So. 547;

Fitzpatrick v. Williams, 5 Cir., 46 F. 2d 40, 73 A. L. R. 1365—later Florida case;

State v. Quigg, 91 Fla. 197, 107 So. 409, 411;

People v. Meyering, 357 Ill. 166, 191 N. E. 318;

Keeton v. Gaiser, 331 Mo. 499, 55 S. W. 2d 302;

Ex Parte Owen, 10 Okla. Cr. 284, 136 Pac. 197, Ann. Cas. 1916 A, 522;

Ex Parte Bergman, 60 Tex. Cr. R. 8, 130 S. W. 174;

Ex Parte Goodman, 79 Tex. Cr. R. 67, 182 S. W. 1120;

Waller v. Jordan, Ariz., 118 P. 2d 450;

State v. Grosch, 177 Tenn. 619, 152 S. W. 2d 239;

In Re Sanders, Ohio App., 31 N. E. 2d 246;

People v. Bell, 372 Ill. 572, 25 N. E. 2d 45;

See also:

35 C. J. S. Extradition, Sec. 3, Page 319;

22 Am. Jur. Extradition, Sec. 9.

The Texas Courts have held that former Section 662 of Title 18 U. S. C. A. controls the local Texas statutes.

Ex Parte Goodman, 182 S. W. 1120.

The Texas Statute Article 1008(a) V. A. C. C. P. Appendix B as interpreted by the Court of Criminal Appeals permits the rendition of Appellant on an information unsupported by an affidavit made before a magistrate as

required by the Federal law. The decision of the Texas Court clearly draws in question the Federal Constitution and the Federal Statutes and challenges their supremacy in the field of interstate extradition. The decision of the Texas Court also sustains the Texas Statute against valid Constitutional objections as presented in that Court. The decision of the Texas Court sustaining the Texas Extradition Statute would permit a State to enact any legislation that it should desire on any terms that the individual State may see fit to impose. The State might provide for extradition of a fugitive on a mere Police Court warrant under the decision of the Texas Court. It has always been the law that the Federal Constitution and Statutes is the source of all authority for interstate rendition. It is conceded that States with consent of Congress may provide for the rendition of non-fugitives upon less exacting terms than is required on interstate rendition of fugitives. These acts usually apply to out of State parolees and to other fugitives such as those that may be rendered under the provision of Sec. 6 of the Texas Extradition Act. However, where the demand is initiated under the Federal law by the executive authority of the demanding State, the rendition must stand or fall by the authority of the Federal Constitution and Statute as supplemented by the local State Statutes.

The exact factual question raised in this appeal has been decided in favor of appellant's position:

Ex Parte Reuben, 238 Pac. 2d 402, Cert. denied, 344 U. S. 840. In this case the affidavit was not made before a magistrate in the demanding State.

II. *Importance.* The question is of general importance to all of the States and the Federal Constitution and Statute should be construed by the Court to remove all doubt as to the meaning thereof in the field of extradition. There has been a continued effort by many States to cut down the authority of the Federal Government to control interstate extraditions. Some of the agreements made between the various States have been without the consent of Congress and would violate the United States Constitution, Article 1, Sec. 10, Clause 3. Many of the decisions by the local State courts are in conflict on this question and the line should be drawn by this Court.

It is submitted that the Court of Criminal Appeals was in error in not discharging the Appellant because the Federal Law had not been complied with and the decision of the Court challenged the validity of the Federal Law and sustained the Texas Statutes against Constitutional objections.

Appellant believes that the questions presented by this appeal are substantial and are of public importance.

Respectfully submitted,

.....

CHARLES W. TESSMER,
202 Fidelity Building,
Dallas, Texas,
Counsel for Appellant.

I hereby certify that 3 copies of this Jurisdictional Statement have been served on the Attorney General of the State of Texas by mailing, postage prepaid, to his office at Austin, Texas, this ..... day of ....., 1955.

.....

CHARLES W. TESSMER

APPENDIX A

NO. 27,384

Ex Parte ALLEN M. PEAIRS

APPEAL FROM

Dallas County

AFFIRMED

OPINION BY

Woodley, Judge

FILED IN THE COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
FEB. 9, 1955
Glenn Haynes
Clerk

Ex Parte ALLEN M. PEAIRS
NO. 27,384
Appeal from Dallas County

OPINION

This is an extradition case.

Appellant is charged in the State of Arkansas with an offense defined in the statutes of that State as the crime

of Failing to Discharge a Materialman's Lien. Arkansas Statutes 51-601.

The Governor of Arkansas, in his requisition, certified that appellant was charged in that state "by affidavit, information and warrant" with said offense. Copies of the affidavit, information and warrant, certified as authentic by the Governor, accompanied the requisition.

It was stipulated that appellant was the person charged in the State of Arkansas and named in the Extradition Warrant.

The record shows that the Constitution of the State of Arkansas now provides that all offenses may be prosecuted either by indictment by a grand jury, or information filed by the prosecuting attorney. Const. Ark. Amend. No. 21.

It is appellant's contention that, notwithstanding the amendment of the Arkansas Constitution permitting prosecution by information, under Sec. 3 of Art. 1008(a), V. A. C. C. P. there must still be an indictment or an information supported by affidavit in order to extradite a fugitive.

The information was filed on February 4, 1954. Unlike the information known to the Texas Code, it is made under oath, and itself constitutes an affidavit to the effect that appellant on December 14, 1951, as a principal contractor and after having been paid the contract price, unlawfully, wilfully and feloniously failed to discharge a materialman's lien for materials furnished to him and installed on the property of a certain corporation, and by virtue of his failure said corporation was forced to pay the $29,060.00

lien after having previously paid appellant the contract price.

This the Governor of Arkansas certifies to be a crime under the laws of Arkansas, from which state appellant fled to Texas.

If this information is not in itself sufficient without an affidavit of some person other than the prosecuting attorney, previously or contemporaneously made and filed, another affidavit made by the prosecuting attorney more fully setting out the facts upon which the state relies was filed on the same day the requisition was issued by the Governor of Arkansas. Also on that day an affidavit was made by E. N. Kimes, plant manager for the named corporation, setting forth fully the facts and the failure of appellant which constitutes the crime in question under Arkansas law.

These affidavits dated February 10, 1954, as well as the information filed February 4, 1954, were attached to the request of the prosecuting attorney for requisition, and were made a part of such requisition.

The cases cited by appellant are to the effect that where there is no showing that the laws of the demanding state are different to those of Texas, and where there is no affidavit to support the information, or where the extradition papers show that the demand is supported by information alone and not by complaint or indictment, the extradition is invalid. See Ex parte Cherry, 155 Tex. Cr. Rep. 324, 234 S. W. 2d 1011; Ex parte Chittenden, 124

Tex. Cr. Rep. 228, 61 S. W. 2d 1008, and cases cited, and Ex parte Gardner, 159 Texas Cr. Rep. 365, 264 S. W. 2d 125.

The fact that the laws of Arkansas authorize prosecution by information alone; that the information is in itself an affidavit; that another affidavit of the prosecuting attorney was on file and these and the affidavit of Kimes were before the Governor when he issued the requisition certifying that appellant stood charged by "affidavit, information and warrant" distinguish this case from the decisions cited.

Appellant vigorously insists that the Arkansas statute is unconstitutional and void, and that the extradition papers show on their face that this is an attempt to enforce a private claim and to imprison him for not paying a money debt.

The Governor of this State, in his warrant, declares that the Governor of Arkansas, in pursuance of the Constitution and Laws of the United States, has demanded the arrest and delivery to the agent of the State of Arkansas of this appellant, who stands charged with the crime of Failing to Discharge a Materialman's Lien committed in that State, and that said demand was accompanied by a copy of the affidavit, information and warrant under which he was so charged, duly certified as authentic by the Governor of Arkansas.

The requisition of the Governor of Arkansas certifies the offense charged against appellant to be a crime in that state, and that appellant is a fugitive from justice.

In the light of these recitations, we cannot agree that the record shows that the prosecution is not in good faith but was for the collection of a debt and not for the purpose of prosecuting appellant for a crime.

The constitutionality of the Arkansas statutes is not for this Court to decide. That question must be reserved for the Arkansas Courts and the Supreme Court of the United States.

We hold that appellant is not illegally restrained and that the trial court did not err in remanding him to be returned to Arkansas.

The judgment is affirmed.

Woodley, Judge.

(Delivered February 9, 1955.)

NO. 27,384

EX PARTE ALLEN M. PEAIRS

APPEAL FROM
DALLAS COUNTY

APPELLANT'S MOTION FOR
REHEARING OVERRULED

OPINION BY

MORRISON
Presiding Judge

FILED IN THE COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
APRIL 20, 1955
Glenn Haynes
Clerk

No. 27,384.

EX PARTE
Allen M. Peairs —Appeal from Dallas County

O P I N I O N
ON MOTION FOR REHEARING

Appellant attacks, in one of the most scholarly briefs to be filed in this Court in some time, the soundness of our

original opinion herein and points out that the affidavit of Kimes was sworn to before a notary public and not before a magistrate. This fact, he says, prevents its use for the purpose of extradition.

According to Section 3 of Article 1008a, V.A.C.C.P., no demand shall be recognized unless accompanied by

1. Copy of indictment, or

2. Information supported by affidavit, or

3. Copy of an affidavit made before a magistrate, together with a copy of a warrant which was issued thereupon, or

4. Copy of a judgment of conviction.

We have concluded that the demand in the instant case falls within category (2) above and that the Act does not require the affidavit mentioned in that category to be made before a magistrate.

He further calls attention to the fact that Title 18, Section 3182, U.S.C.A., provides, in part, that the demand must be accompanied by "an affidavit made before a magistrate" and contends that any order of extradition based upon the affidavit before us would be invalid and in violation of such Act. This contention requires more study.

The Legislature of this State enacted Article 1008a, V.A.P.C., Uniform Criminal Extradition Act, in 1951. Forty of our States, including Arkansas, have now adopted such an Act.

Following such adoption, the Federal rendition statute (Title 18, Section 3182) ceased to be the exclusive method

of extradition between states who have adopted the Uniform Act. Gulley v. Apple (Ark.), 210 S. W. 2d 514; Ex parte Tenner (Cal.), 128 Pac. 2d 338, 314 U. S. 585, 86 L. Ed. 473, 217 U. S. 597, 87 L. Ed. 488.

A state statute on the subject of extradition is unconstitutional only when it seeks to abridge or lessen the duty placed by the Constitution on the part of the chief executive of the asylum state. It follows that any state statute which facilitates the rendition of persons charged with crime is not in conflict with the Federal Constitution and rests rather upon the comity between states and not upon the Federal Constitution. Culbertson v. Sweeney, 44 N. E. 2d 809, and Cassis v. Fair (Tex.), 29 S. W. 2d 245, 151 A. L. R. 233, at page 237.

A state statute which makes less strenuous requirements than those set forth in the Federal rendition statute is valid and does not conflict with the Federal statute.

Prior to the enactment of Article 1008a in 1951, there was no statute in this state which set forth the requirements of a demand, and so naturally the Federal statute was looked to in order to determine its requisites. Such reference is no longer necessary if the statute meets the test set forth above.

Appellant cites many cases decided in this and other Courts prior to the adoption of the State Uniform Criminal Extradition Acts. Such cases ceased to be authority following this basic change in our law relating to extradition and need not be here discussed.

Appellant's last contention is that the affidavit of Kimes is insufficient to support the information because it was made several days after the information was filed but before the issuance of the demand. It is the general rule that for an information to be valid it must be based upon a complaint then in existence. This is true in all prosecutions for misdemeanors in this State, but does it necessarily follow that this is true where we are testing the authority of the Governor to grant extradition? It is interesting to note that the extradition statue says information *supported* by affidavit, not *based upon* an affidavit.

By a well reasoned opinion (Supreme Court, Appellate Division, Fourth Department), People v. Skinner, 135 N. Y. S. 2d 107, this identical question has been decided. The court said:

> "We are of the opinion that a proper and judicious interpretation of the language of a statute requires that the affidavits referred to as in support of an information are only for the purpose of demonstrating to the governors of both the demanding state and the state of asylum that there is merit in the formal charge laid by a public prosecuting officer, or at least that the information, rarely ever made upon personal knowledge, is not unfounded. As such, the date of the supporting affidavits has no bearing upon their sufficiency to meet the requirements of the New York statute."

In opposition to this holding, we are cited, Ex parte Gardner, 159 Texas Crim. Rep., 365, 264 S. W. 2d 125. There we said:

> "There is no showing in the record that the laws of Arkansas are any different from those of this State.

> In the absence of such a showing, we are bound to assume that they are the same. Ex parte Cherry, 155 Tex. Cr. R. 324, 234 S. W. 2d 1011.
>
> "* * *.
>
> "It is apparent that the affidavit was made after the execution of the information. This Court has always required that an information be based upon a complaint then in existence."

In the instant case, the laws of Arkansas are shown, and we learn therefrom that prosecution in that state may be instituted upon information alone. It therefore follows that the affidavit of Kimes was not necessary in order to institute prosecution. Its sole function was to meet the requirements of our extradition statute. When considered in that light, the holding in People v. Skinner, supra, is in point. At the time the Governor of Arkansas issued the demand and at the time the Governor of this State granted the same and issued the warrant, each had before him an "information supported by affidavit," as required by the extradition acts of each state.

Remaining convinced that we properly disposed of this cause originally, appellant's motion for rehearing is overruled.

Morrison, Presiding Judge.

(Delivered April 20, 1955.)

No. 27,384

Ex PARTE ALLEN M. PEAIRS

APPEAL FROM

Dallas County

DISSENTING OPINION BY

Davidson, Judge

FILED IN THE COURT OF CRIMINAL APPEALS

AUSTIN, TEXAS

APRIL 20, 1955

Glenn Haynes

Clerk

No. 27,384

Ex parte Allen M. Peairs —Appeal from Dallas County

DISSENTING OPINION ON APPELLANT'S MOTION FOR REHEARING

My brethren hold that under the statute law of this state (Art. 1008a, C. C. P.) a charge in the demanding state by information supported by an affidavit made before a non-

magistrate will support and authorize interstate extradition.

What my brethren hold, then, is that the Constitution of the United States and the acts of Congress authorizing and regulating interstate extradition are not exclusive and that a state may authorize interstate extradition of citizens of that state or persons found therein upon any ground or for any reason the state may deem proper to enact or promulgate. My brethren expressly hold that a state statute that authorizes interstate extradition for reasons not set forth in or covered by the federal statute is valid.

To these conclusions I do not agree, and therefore enter my dissent.

Art. IV., Sec. 2 of the Constitution of the United States reads, in part, as follows:

> "A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up to be removed to the State having Jurisdiction of the Crime."

To carry into effect that constitutional provision, Congress passed what is now Title 18, Sec. 3182, U. S. C. A., as follows:

> "Fugitives from State or Territory to State, District or Territory.
>
> "Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State, District

> or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, the executive authority of the State, District or Territory to which such person has fled shall cause him to be arrested and secured, and notify the executive authority making such demand, or the agent of such authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within thirty days from the time of the arrest, the prisoner may be discharged."

In addition to the foregoing statute and in order to effectuate interstate extradition, Congress made it a federal offense for one to flee from one state to another for the purpose of avoiding prosecution in certain cases. 48 Stat. 782.

The right of interstate rendition must, of necessity, be founded upon and controlled by the federal constitution and statutes mentioned.

The federal constitution provided the authority. Congress provided the implements for making effectual the extradition of fugitives from justice from one state to another.

It is clear that the matter of interstate extradition is what it purports to be—that is, a matter beween the states and therefore interstate. But, also, the Congress has fully and completely preempted that field and taken over the right to control interstate extradition. 35 C. J. S., Sec. 2,

Extradition, p. 318, furnishes the authority for the conclusion expressed.

Prior to such pronouncement by my brethren, I never heard that interstate extradition is a matter within the control of the individual states. My understanding of the rules is stated in 35 C. J. S., Extradition, Sec. 3, p. 319, as follows:

> "While constitutional and statutory provisions relating to interstate extradition should be liberally construed to effect their purposes, their essential elements and requirements must be strictly followed. State legislation on the subject is valid only to the extent to which it aids and is not inconsistent with the federal Constitution and statutes."

The holding of my brethren is directly contrary to the rule just stated.

The authorities my brethren cite in support of their conclusion relate in no particular to interstate extradition, but refer entirely to a matter of comity between the states touching persons who are not fugitives from justice.

Interstate extradition applies only to fugitives from justice. 35 C. J. S., Extradition, Sec. 10, p. 324.

Parolees going from one state to another by and with the consent of the state are not fugitives from justice.

My conclusion, therefore, is that there is no basis for the holding of my brethren that the legislature of this state may, by statute, make "less strenuous requirements than those set forth in the Federal rendition statute" and that

there is no basis for their conclusion that such a statute does not conflict with the federal law. To the contrary, that conclusion is contrary to all the law heretofore written on the subject and clothes the states not only with the power to control interstate matters by legislation but also with the power to take from Congress control over a field of legislation which it has preempted.

So then, under the holding of my brethren it is within the power of the legislature of this state to prescribe by law for one's extradition upon a charge in the demanding state entirely different from and inconsistent with the requirement of the federal statute (Sec. 3182).

Applying that holding here, my brethren destroy the mandatory provision of said Sec. 3182, which limits extradition only to instances where the accusation in the demanding states is by indictment or affidavit made before a magistrate, and now authorize extradition where the accusation in the demanding state is by an affidavit before a nonmagistrate.

By the same rule, the legislature of this state would be empowered to authorize an extradition where the accusation in the demanding states is by information only.

We have always held that extradition could not be accomplished when the charge in the demanding state is by information only. *Ex parte Cherry, 155 Tex. Cr. R. 324, 234 S. W. 2d 1011.*

Indeed, if the legislature has the power to authorize extradition upon such conditions as to it may seem proper,

then it could dispense entirely with a requirement of an accusation in the demanding state and authorize the rendition upon a warrant issued by the demanding state.

A warrant has been held to be insufficient to authorize extradition. Ex parte Shillings, 124 Tex. Cr. R. 482, 63 S. W. 2d 853.

In keeping with the innovation and hitherto unheard-of rule, my brethren conclude that under the statute law of this state this appellant is to be extradited not upon an indictment or affidavit made before a magistrate but upon an affidavit made before one not a magistrate.

This holding defeats the federal statute on the subject and destroys interstate rendition by federal authority.

Unless and until an accused is charged in the demanding state by indictment or affidavit made before a magistrate, the right to extradite him is not shown. Such is the mandate of the federal statute. The power does not lie with the legislature of this state to destroy that statute.

Not being charged in the demanding state by indictment or affidavit made before a magistrate, appellant is entitled to be discharged from arrest and custody under the warrant of the governor of this state extraditing him to the state of Arkansas.

Davidson, Judge.

(Delivered April 20, 1955.)

APPENDIX B

Art. I, Sec. 10. Clause 3 of the Constitution of the United States, reads as follows:

> "No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay."

Art. IV, Sec. 2, Clause 2 of the Constitution of the United States reads as follows:

> "A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up to be removed to the State having Jurisdiction of the Crime."

Title 18 Sec. 3182 U. S. C. A. as follows:

> "Fugitives from State or Territory to State, District or Territory
>
> "Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State, District or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, the executive authority of the State, District or Territory to which such person has fled shall cause him to

be arrested and secured, and notify the executive authority making such demand, or the agent of such authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within thirty days from the time of the arrest, the prisoner may be discharged."

Art. 1008(a) V. A. C. C. P. Sec. 3, reads as follows:

"No demand for the extradition of a person charged with crime in another state shall be recognized by the Governor unless in writing alleging, except in cases arising under Section 6, that the accused was present in the demanding state at the time of the commission of the alleged crime, and that thereafter he fled from the state, and accompanied by a copy of an indictment found or by information supported by affidavit in the state having jurisdiction of the crime, or by a copy of an affidavit made before a magistrate there, together with a copy of any warrant which was issued thereupon; or by a copy of a judgment of conviction or of a sentence imposed in execution thereof, together with a statement by the Executive Authority of the demanding state that the person claimed has escaped from confinement or has broken the terms of his bail, probation or parole. The indictment, information, or affidavit made before the magistrate must substantially charge the person demanded with having committed a crime under the law of that state; and the copy of indictment, information, affidavit, judgment of conviction or sentence must be authenticated by the Executive Authority making the demand; provided, however, that all such copies of the aforesaid instruments shall be in duplicate, one complete set of such instruments to be delivered to the defendant or to his attorney."

AUG 2 3 1955
HAROLD B. WILLEY, Cl

IN THE

Supreme Court of the United States

..... TERM 1955

No. 284

ALLEN M. PEAIRS,
Appellant,

v.

THE STATE OF TEXAS,
Appellee.

MOTION TO DISMISS

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August 26, 1955

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IN THE

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No. .....

ALLEN M. PEAIRS,
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THE STATE OF TEXAS,
Appellee.

MOTION TO DISMISS

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Now comes appellee, the State of Texas, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, and files this its Motion to Dismiss, on the grounds that the questions here presented for review are so unsubstantial as not to warrant further argument.

Opinions Below

The opinions of the Court of Criminal Appeals of Texas have not yet been reported. (Reference is

made, however, to Appendix A of appellant's Jurisdictional Statement, wherein the said opinions have been set out in full).

Jurisdiction

Appellant invokes jurisdiction under 28 U.S.C., Sec. 1257(1) and 28 U.S.C., Sec. 1257(2).

Question Presented

Is Section 3 of Article 1008a, Texas Code of Criminal Procedure, invalid solely because its provisions facilitate the interstate rendition of fugitives from justice, in accordance with the manifest purpose and intent of our Federal Constitution, Article IV, Section 2, Clause 2, and in accordance with the purpose and intent of the federal extradition statute, 18 U.S.C., Sec. 3182?

Statement of the Case

Section 1 of the Twenty-first Amendment to the Constitution of Arkansas provides the following:

> "All offenses heretofore required to be prosecuted by indictment may be prosecuted either by indictment by a grand jury or information filed by the Prosecuting Attorney."

In accordance with the provisions of the above quoted Amendment, appellant was duly charged in

the State of Arkansas by information, with the felony offense of failing to discharge a materialman's lien. Arkansas Statutes, Section 51-601.

The Governor of Arkansas, upon the request of the Prosecuting Attorney (S.F. 22-24), issued a requisition addressed to the Governor of Texas (S.F. 21-22), demanding the apprehension and return of appellant to the State of Arkansas so that he might be tried for the offense with which he was there charged. The Chief Executive of Arkansas certified in his requisition that appellant was charged "by affidavit, information and warrant" in Arkansas with the above described offense, and copies of the affidavit, information and warrant (S.F. 25-36), certified as authentic by the Governor, accompanied the requisition. The Governor of Texas thereupon issued his Executive warrant for the arrest of appellant (S.F. 19-20), and appellant was thereafter taken into custody.

Appellant filed an application for a writ of habeas corpus. (Tr. 1-2.) At the hearing on the application, the parties stipulated as to the identity of the appellant (S.F. 2) and as to his presence in the State of Arkansas at the time the offense was committed. (S.F. 3.) The Criminal District Court of Dallas County, Texas, entered its judgment denying the application (Tr. 4), and this judgment was affirmed in all things by the Texas Court of Criminal Appeals.

Having wholly failed in the Texas Courts in his attempt to establish for himself a place of permanent asylum, appellant now asks this Honorable Court to construct such a refuge for him.

Argument

Article IV, Section 2, Clause 2 of the Constitution of the United States of America, reads as follows:

> "A person *charged in any State* with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up to be removed to the State having Jurisdiction of the Crime." (Emphasis ours.)

Article 1008a, Texas Code of Criminal Procedure, contains the following provisions with regard to the extradition of fugitives from justice:

> "Sec. 3. No demand for the extradition of a person charged with crime in another state shall be recognized by the Governor unless in writing alleging, except in cases arising under Section 6, that the accused was present in the demanding state at the time of the commission of the alleged crime, and that thereafter he fled from the state, and accompanied by a copy of an indictment found or *by information supported by affidavit in the state having jurisdiction of the crime*, or by a copy of an affidavit made before a magistrate there, together with a copy of any warrant which was issued thereupon; or by a copy of a judgment of conviction or of a sentence imposed in execution thereof, together with a statement by the Executive Authority of the demanding state that the person claimed has

escaped from confinement or has broken the terms of his bail, probation or parole. The indictment, information, or affidavit made before the magistrate must substantially charge the person demanded with having committed a crime under the law of that state; and the copy of indictment, information, affidavit, judgment of conviction or sentence must be authenticated by the Executive Authority making the demand; provided, however, that all such copies of the aforesaid instruments shall be in duplicate, one complete set of such instruments to be delivered to the defendant or to his attorney." (Emphasis ours.)

It is instantly clear that, for the purpose of interstate rendition, our Federal Constitution requires the combination of three facts before a person may be lawfully removed from one State to another. Under this provision, no person may be so removed unless: (1) He is *charged* in one State with a crime; (2) he has fled from justice; and (3) a demand has been made for his delivery to the State wherein he is charged with crime.

How can appellant reasonably and in good conscience assert that Section 3 of Article 1008a, Texas Code of Criminal Procedure, contravenes the literal meaning of the above quoted section of our federal Constitution? On the contrary, nothing is more certain than that the provisions of Section 3 of Article 1008a directly further the purposes laid down in the United States Constitution.

This Honorable Court has reiterated many times that Article IV, Section 2, Clause 2 of the federal

Constitution, must be liberally construed to accord with its manifest purposes and intent. *Appleyard v. Massachusetts*, 203 U.S. 222 (1906). In that case, Mr. Justice Harlan made the following statement at page 227:

> ". . . The constitutional provision relating to fugitives from justice, as the history of its adoption will show, is in the nature of a treaty stipulation entered into for the purpose of securing a prompt and efficient administration of the criminal laws of the several states,—an object of the first concern to the people of the entire country, and which each state is bound, in fidelity to the Constitution, to recognize. A faithful, vigorous enforcement of that stipulation is vital to the harmony and welfare of the states. And while a state should take care, within the limits of the law, that the rights of its people are protected against illegal action, *the judicial authorities of the Union should equally take care that the provisions of the Constitution be not so narrowly interpreted as to enable offenders against the laws of a state to find a permanent asylum in the territory of another state.*" (Emphasis ours.)

A part of the above language was then quoted with approval in the case of *People of Illinois ex rel. McNichols v. Pease*, 207 U.S. 100, 112 (1907).

Other pertinent language to the same effect appears in the case of *Biddinger v. Commissioner of Police of New York City*, 245 U.S. 128 (1917),

where Mr. Justice Clarke wrote the following at page 132:

> "The provision of the Federal Constitution quoted, with the change of only two words, first appears in the Articles of Confederation of 1781, where it was used to describe and to continue in effect the practice of the New England colonies with respect to the extradition of criminals. Kentucky v. Dennison, 24 How. 66, 16 L. ed. 717. The language was not used to express the law of extradition as usually prevailing among independent nations, but *to provide a summary executive proceeding by the use of which the closely associated states of the Union could promptly aid one another in bringing to trial persons accused of crime by preventing their finding in one state an asylum against the processes of justice of another*. . . . Its design was and is, in effect, to eliminate, for this purpose, the boundaries of states, so that each may reach out and bring to speedy trial offenders against its laws from any part of the land.
>
> "Such being the origin and purpose of these provisions of the Constitution and statutes, they have not been construed narrowly and technically by the courts as if they were penal laws, but liberally, to effect their important purpose, . . ." (Emphasis ours.)

Under the authority of Article IV, Section 2, Clause 2 of our United States Constitution, and in direct furtherance of its purposes, the Congress of

the United States enacted an extradition statute, 18 U.S.C., Sec. 3182, which reads as follows:

> "Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State, District or Territory to which such person has fled, *and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory,* charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, the executive authority of the State, District or Territory to which such person has fled shall cause him to be arrested and secured, and notify the executive authority making such demand, or the agent of such authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within thirty days from the time of the arrest, the prisoner may be discharged." (Emphasis ours.)

Appellee respectfully urges that this enactment must also be liberally construed to promote the ends for which it was enacted. *Brewer v. Goff*, 138 F. 2d 710 (C.C.A., 10th Cir., 1943). When thus liberally interpreted, Section 3182 of the United States Code is in all respects consistent with Article 1008a of the Texas Code of Criminal Procedure.

Any pleading which is sufficient in a State to initiate a criminal prosecution therein should be suf-

ficient as well to support the extradition of the accused and his delivery to the State wherein he is charged. And this Honorable Court has so held. *In Re Strauss*, 197 U.S. 325, 332 (1905). Mr. Justice Brewer, speaking for this Court in the *Strauss* case, has in effect said that the rule cannot be otherwise:

> "But who would doubt that an information, where that is the statutory pleading for purposes of trial, is sufficient to justify an extradition?"

It is especially noteworthy in view of the above language that this Court in the *Strauss* case specifically considered the federal extradition statute. In fact, the pertinent provisions of the federal act were quoted in the second sentence of the *Strauss* opinion. It has also been established that the federal courts will take notice of the laws of the demanding State in an extradition proceeding. *Hogan v. O'Neill*, 255 U.S. 52 (1921); *Ex Parte Nash*, 44 F. 2d 403 (W.D. Ark. 1930).

An interesting statement by a New Jersey court of the rule announced in the *Strauss* decision appears in the case of *Stark v. Livermore*, 3 N.J. Super. 94, 65 A. 2d 625 (1949), at page 627:

> ". . . Although the Congressional Act mentions indictments and affidavits before magistrates charging the commission of crime it does not refer, by name, to criminal informations which are well recognized in the practice of other states including New York. *However, the Act is entitled to a*

liberal construction in the light of its important public objectives, see Biddinger v. Commissioner of Police of the City of New York, 1917, 245 U.S. 128, 38 S.Ct. 41, 62 L. Ed. 193, *and there have been indications that criminal informations in states which allow them will be treated as indictments for extradition purposes.* See In the Matter of Strauss, 1905, 197 U.S. 324, 332, 25 S.Ct. 535, 49 L. Ed. 774, 779; People ex rel. Lyman v. Smith, Sup. Ct. 1933, 352 Ill. 496, 186 N.E. 159. See also Robichaud v. Brennan, Supt. Ct. 1946, 134 N.J.L. 532, 49 A. 2d 287, 289, affirmed Err. & App. 1947, 135 N.J.L. 472, 52 A. 2d 697, certiorari denied, 1947, 332 U.S. 756, 68 S.Ct. 54, 92 L. Ed. 342, rehearing denied, 1947, 332 U.S. 819, 68 S.Ct. 149, 92 L. Ed. 396, where the court stated that a warrant issue by a Michigan Circuit Court Judge in accordance with the practice of that state, for what has been termed a 'one man grand jury', was, in effect, an indictment within the meaning of the Act." (Emphasis ours.)

See also *Ex Parte Davis*, 68 Cal. App. 2d 798, 158 P. 2d 36 (1945).

The federal extradition statute does not purport to exclude legislation by the States in *aid* of the purposes of the constitutional provision. Therefore, since the provisions of Article IV, Section 2, Clause 2 of the United States Constitution, were not designed for the benefit and protection of fugitives from justice, an asylum state may require its Governor to surrender a fugitive on terms less exacting

than those imposed by the Act of Congress. *Gulley v. Apple*, 213 Ark. 350, 210 S.W. 2d 514 (1948).

Appellant was lawfully charged with crime in the State of Arkansas by an information filed by the prosecuting attorney. (S.F. 27-28.) This information was supported by the affidavit of the prosecuting attorney (S.F. 25-26), and the affidavit of the complaining witness, E. N. Kimes. (S.F. 32-36.) That appellant was not *indicted* in the State of Arkansas is immaterial, since, by virtue of Section 1 of the Twenty-first Amendment to the Arkansas Constitution, an information alone is sufficient to initiate a criminal proceeding in Arkansas. Furthermore, an information supported by affidavit fully satisfies the requirements of the Uniform Criminal Extradition Act of Texas, Article 1008a, Texas Code of Criminal Procedure. It is clear that appellant has been "charged" with a crime in Arkansas within the meaning of Article IV, Section 2, Clause 2 of our United States Constitution. Nothing further is required for extradition purposes.

Appellant also argues that Article 1008a of the Texas Code of Criminal Procedure is invalid as a violation of Article I, Section 10, Clause 3 of the United States Constitution. Appellee asserts that this contention is absolutely devoid of merit. *United States v. Flegenheimer*, 14 F. Supp. 584 (D.C. New Jersey 1935, appeal dism. 110 F. 2d 379). In the alternative, and if the consent of Congress is necessary to the passage by the various States of the Uniform Criminal Extradition Act, such affirmative consent has been given. 4 U.S.C., Sec. 111.

Conclusion

Appellee strongly urges that the appellant has wholly failed to present a substantial federal question for the decision of this Court. Appellee therefore respectfully moves this Court to dismiss the instant appeal.

Respectfully submitted,

JOHN BEN SHEPPERD
Attorney General of Texas

KATHERINE W. CONTI
Assistant Attorney General
Capitol Station
Austin, Texas

Attorneys for Appellee,
The State of Texas

August 25, 1955

I hereby certify that a copy of this Motion, together with a copy of the letter of transmittal to the Clerk of the United States Supreme Court, have been mailed this date to Charles W. Tessmer, 202 Fidelity Building, Dallas, Texas, Attorney for Appellant (First Class Postage Prepaid).

JOHN BEN SHEPPERD

SEP 12 1955
HAROLD B. WILLEY, Clerk

In the

Supreme Court of the United States

TERM, 1955

No. 284

ALLEN M. PEAIRS,
Appellant,

v.

THE STATE OF TEXAS,
Appellee.

On Appeal from the Court of Criminal Appeals of the State of Texas, Austin, Texas

REPLY BRIEF

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In the

Supreme Court of the United States

..... TERM, 1955

No. 284

ALLEN M. PEAIRS,

Appellant,

v.

THE STATE OF TEXAS,

Appellee.

On Appeal from the Court of Criminal Appeals of the State of Texas, Austin, Texas

---

REPLY BRIEF

To the Honorable Supreme Court of the United States:

May it please the Court, Appellee seeks to have this Court hold that an information where permitted by the law of the demanding State will support an interstate rendition without a proper affidavit made before a magistrate as required by the Federal Statute. This is not the law. The reasoning of Appellee in making this argument in the Motion to Dismiss would permit any State to enact legis-

lation permitting an extradition upon the Bench Warrant of a Police Court.

Appellee cites:

FIRST

Appleyard v. Massachusetts, 203 U. S. 222 (1906). This case only decided that one who left the demanding State under a belief that he was not a fugitive could not defeat extradition by showing his belief and intent at the time he left the demanding State.

Appellee has failed to quote from the *Appleyard* case the following:

> "On production of such indictment or affidavit certified as authentic by the Governor of the State from which the accused departed, such is a command of the Supreme law of the land, which may not be disregarded by any State."

SECOND

Brewer v. Goff, 138 F. 2d 710 (C. C. A. 10th Cir., 1943). It is urged that this decision liberally construed the Federal Statute and Constitutional provisions. The opinion in this case by Judge Murrah reaffirms the doctrine that the accused must be substantially charged in the demanding State.

It follows that substantially means that *Title 18, U. S. C. A., Sec. 3182,* must be complied with as follows: "* * * and produces a copy of an indictment found or affidavit made before a magistrate of any State or Territory * * *."

In the *Brewer* case the moving papers were proper in all respects and the affidavit was made before a magistrate.

THIRD

In Re Strauss, 197 U.S. 325 (1905), contains the Court's dicta cited at Page 9 of Appellee's Motion to Dismiss. However, the case only held that a complaint properly made before a magistrate was sufficient without an indictment, the contention having been made that the accused could not be tried on the mere complaint in the demanding State. The opinion went on to state that every information must be supported by affidavit before a magistrate.

FOURTH

Appellant agrees with *Hogan v. O'Neill, 255 U. S. 52 (1921)*, and *Ex Parte Nash, 44 F. 2d 403 (W. D. Ark., 1930)*, to the effect that the Federal Courts will take notice of the laws of the demanding State in extradition proceedings. The further reasoning being that extradition is a Federal matter, thus an exception is created to the law that the Supreme Court will judicially notice only the law judicially known to the State Court.

FIFTH

Stark v. Livermore, 3 N. J. Super. 94, 65 A. 2d 625 (1949). This decision is unsound in reasoning and should be disregarded by this Court.

SIXTH

Ex Parte Davis, 68 Cal. App. 2d 798, 158 P. 2d 36 (1945), at Page 10 of Appellee's Motion to Dismiss contains dicta to the effect that an affidavit before a magistrate is unnecessary, however, in that case there were two good affidavits, made before a magistrate, in the record as a basis for the decision.

SEVENTH

U. S. v. Flegenheimer, 14 F. S. 584 (D. C. New Jersey, 1935, appeal dism. 110 F. 2d 379). This case involved a removal of the accused from one district to another under the Federal law and is not in point with the matter before this Court.

CONCLUSION

Appellee has not seen fit to discuss the numerous authorities cited by Appellant in the Jurisdictional Statement.

Appellee's Motion to Dismiss clearly indicates that this Court should hear this case on the merits in order that the Federal law with reference to interstate extraditions may be clarified for the benefit of all concerned.

Respectfully submitted,

CHARLES W. TESSMER,
202 Fidelity Building,
1000 Main Street,
Dallas, Texas,
Counsel for Appellant.

September ....., 1955.

I hereby certify that a copy of this Brief, together with a copy of the letter of transmittal to the Clerk of the United States Supreme Court, have been mailed this date to the Honorable John Ben Shepperd, Attorney General of Texas, at Austin, Texas, Attorney for Appellee (First Class Postage Prepaid).

.....

CHARLES W. TESSMER

No. 284. PEAIRS *v.* TEXAS. Appeal from the Court of Criminal Appeals of Texas. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Charles W. Tessmer* for appellant. *John Ben Shepperd,* Attorney General of Texas, and *Katherine W. Conti,* Assistant Attorney General, for appellee. Reported below: 162 Tex. Cr. R. —, 283 S. W. 2d 755.